BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JERRY RANDALL Claimant	)	
VS.	)	
KALMAR INDUSTRIES, LLC Respondent	)	Docket No. 1,037,382
AND	)	
ACE AMERICAN INSURANCE COMPANY Insurance Carrier	)	

ORDER

Both parties requested review of the December 30, 2008 Award by Administrative Law Judge (ALJ) Kenneth J. Hursh. The Board heard oral argument on April 7, 2009.

APPEARANCES

Gary L. Jordan, of Ottawa, Kansas, appeared for the claimant. Steven J. Quinn, of Kansas City, Missouri, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The ALJ found that the claimant was entitled to a 73.13 percent work disability for the injury he sustained while in respondent's employ. This figure represents an 81.25 percent task loss and a 65 percent wage loss. The wage loss component reflects a finding by the ALJ that while claimant's decision to retire from his job at respondent's plant was reasonable (and did not demonstrate a lack of good faith) he nevertheless failed to exhibit good faith in finding other post-injury employment. Thus, the ALJ imputed a wage of $8.25 per hour which left claimant with a 65 percent wage loss.

The respondent has appealed this award as it contends claimant voluntarily left his employment with respondent, electing to retire rather than continuing to work. Respondent maintains it would have been able to accommodate the treating physician's restrictions. Thus, respondent argues that claimant is not entitled to a permanent partial general (work) disability in excess of his 18 percent functional impairment.

Claimant has also appealed the Award contending that he is entitled to permanent total disability pursuant to K.S.A. 44-510c(a)(2) and *Lyons v. IBP, Inc.*, 33 Kan. App. 2d 369, __ P.2d __ (2004). Alternatively, claimant suggests the Award be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Permanent Total Disability

K.S.A. 44-510c(a)(2) defines permanent total disability as follows:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

While the injury suffered by the claimant was not an injury that raised a statutory presumption of permanent total disability under K.S.A. 44-510c(a)(2) , the statute provides that in all other cases permanent total disability shall be determined in accordance with the facts. The determination of the existence, extent and duration of the injured worker's incapacity is left to the trier of fact.[1]

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[1] *Boyd v. Yellow Freight Systems, Inc.*, 214 Kan. 797, 522 P.2d 395 (1974).

In *Wardlow*[2], the claimant, an ex-truck driver, was physically impaired and lacked transferrable job skills making him essentially unemployable as he was capable of performing only part-time sedentary work.

The Court, in *Wardlow*, looked at all the circumstances surrounding his condition including the serious and permanent nature of the injuries, the extremely limited physical chores he could perform, his lack of training, his being in constant pain and the necessity of constantly changing body positions as being pertinent to the decision whether the claimant was permanently totally disabled.

The ALJ concluded that claimant had failed to prove "by a preponderance of the evidence that he is permanently totally disabled on account of the injury."[3] The majority agrees with this finding. Mary Titterington testified that claimant was capable of working under either of the testifying physicians' restrictions. She identified several potential employments within those restrictions, including bench repair work, light assembly or sub-assembly, light delivery driving and as a security guard. The ALJ's finding that claimant is not permanently and totally disabled is affirmed.

Permanent Partial General (Work) Disability

When an injury does not fit within the schedules of K.S.A. 44-510d, permanent partial general disability is determined by the formula set forth in K.S.A. 44-510e(a), which provides, in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. **The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury.** In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation**

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[2] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 113, 872 P.2d 299 (1993).

[3] ALJ Award (Dec. 30, 2008) at 3.

> **in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*[4] and *Copeland*.[5] In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing an accommodated job that paid a comparable wage. In *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a) (Furse 1993), that a worker's post-injury wage should be based upon the ability to earn wages rather than actual earnings when the worker failed to make a good faith effort to find appropriate employment after recovering from the work-related accident.

> If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.[6]

Both parties agree that claimant could not return to his pre-injury position with respondent given either of the testifying physicians restrictions. However, respondent argues that claimant did not act in good faith by electing to retire from his job after receiving his permanent restrictions. According to respondent's witness, Ms. Harris, work would have been made available to claimant. It is uncontroverted that no post-injury job was ever offered to claimant. Ms. Harris testified that it was the company's policy to "look at the restrictions and review the jobs that are available in the plant to determine if there's a reasonable accommodation that can be made to bring the associate back to work."[7] There is some support in the record that evidences an ability to accommodate workers with restrictions. However, those individual's restrictions were less severe than claimant's.

But this contention was challenged by one of claimant's witnesses. Leonard Burnett, the local union steward, testified that he had a face-to-face conversation with Jack Sawery at the plant in March 2007. According to Mr. Burnett, Mr. Sawery indicated that there was no employment available for any employees who had permanent restrictions or were less than "100 percent".[8]

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[4] *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

[5] *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

[6] *Id.* at 320.

[7] Harris Depo. at 10.

[8] R.H. Trans. at 58-59.

Claimant testified that based on his years of experience working for respondent, that he would be unable to do any job they might offer given his back and leg pain. He also indicated that he talked to Ms. Harris about his condition and says she told him it looked like he would not be able to do his job.[9] Thus, he elected to retire from respondent's employ. He testified that he would attempt any job that would have *or would be* offered to him but to date, none has been offered.[10] Indeed, respondent wished him well and helped celebrate his retirement with a party.

When considering the good faith component of the work disability analysis, the ALJ noted the following:

> Whatever actually transpired between the claimant and Harris, it was clear that the claimant was not offered accommodated employment, despite the respondent's professed willingness to accommodate. If the respondent really intended to put the claimant to work, one would think they would have mentioned it before throwing him a retirement party. Plus, the few instances where the respondent did accommodate an employee involved restrictions not quite as severe as claimant's.[11]

The Board has considered this aspect of the ALJ's Order and finds the ALJ's finding should be affirmed. Given claimant's experience working for respondent, it is reasonable to accept his belief that he would not be able to perform an accommodated job for respondent. Even so, claimant stood ready to attempt whatever job he might have been offered and his voluntary decision to retire did not, in any way, impair respondent's ability to offer him such a position and respondent has not identified any job it has available that claimant could perform within his restrictions. Like the ALJ, the Board finds that claimant did not exhibit a lack of good faith in deciding to retire. Thus, the wage he might have earned at that hypothetical job that was never offered to him will not be imputed to him for purposes of the work disability analysis.

Although the ALJ concluded claimant did not demonstrate a lack of good faith in retaining his employment with respondent, he nonetheless concluded that claimant's decision to forego making any effort whatsoever to find subsequent employment amounted to a lack of good faith. Thus, he imputed a wage of $8.25 an hour. This figure represents a"midpoint" of the opinions expressed by each party's experts.[12]

Claimant concedes he has made no effort to find post-injury employment. The vocational experts both testified about claimant's capacity to earn wages, although Michael

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[9] *Id.* at 26.

[10] *Id.* at 26-27.

[11] ALJ Award (Dec. 30, 2008) at 4.

[12] Those opinions varied from $7-8.00 an hour from Michael Dreiling to $9-9.50 an hour.

Dreiling indicates that claimant is realistically unemployable. Thus, his analysis with respect to a $7-8.00 an hour wage is somewhat qualified and only reflects wages that he *might* earn *if* he could find employment within his restrictions. In contrast, Mary Titterington offered a number of potential employments that use some of the skills claimant has gathered from his 15 years of employment with respondent. But she did not actual inquire as to the availability of those jobs in claimant's job market. Admittedly, claimant's prospects are not bright given his age, lack of education and the restrictions the physicians have imposed. The majority of the Board finds that an $8.25 an hour wage is reasonable and should be affirmed. Claimant has sustained a 65 percent wage loss as a result of his injury.

The ALJ also took note of Dr. Cicarelli's 62.5 percent task loss opinion (based upon Michael Dreiling's task list) as well as Dr. Zimmerman's 90 to 100 percent task loss opinions (based on both Dreiling and Titterington's list) and concluded claimant's task loss was 81.25 percent. The ALJ's approach gave approximately equal weight to both task loss opinions and the Board finds that approach reasonable as neither of the opinions is any more persuasive than another. Accordingly, the 81.25 percent task loss is affirmed.

In light of the foregoing, the ALJ's Award is affirmed in all respects.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Kenneth J. Hursh dated December 30, 2008, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of May 2009.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

DISSENT

I respectfully disagree with the majority as I believe claimant is essentially and realistically unemployable. Accordingly, I feel claimant should receive permanent total disability benefits under K.S.A. 44-510c. Claimant is in his early to mid 60's, has a high school education, but has difficulty reading and writing. Physical labor comprises his work history.

Claimant sustained a serious low back injury, which required surgery at both the L4-S1 intervertebral levels. At best, claimant can lift from 20-25 pounds, but should avoid repetitive bending and lifting. At worst, claimant can lift 20 pounds maximum and only 10 pounds occasionally, but must restrict his sitting and walking to 25 to 45 minutes per hour, limit standing to 1.5 hours at a time, and avoid frequent bending, squatting, climbing, kneeling and twisting.

Since being released from medical treatment in March 2008, claimant's condition had continued to worsen. He now experiences pain across his low back and down his right leg. Consequently, claimant takes both over-the-counter and prescription pain medication.

Considering claimant's age, education, work history, and ongoing symptoms, I am persuaded by vocational expert Michael Dreiling's opinion that absent accommodated work activities it is unreasonable to expect claimant would be employable in the competitive open labor market.

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BOARD MEMBER

c: Gary L. Jordan, Attorney for Claimant
Steven J. Quinn, Attorney for Respondent and its Insurance Carrier
Kenneth J. Hursh, Administrative Law Judge